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21 December 2009

Sir David Gascoigne KNZM CBE LLM
The Judicial Conduct Commissioner
Office of Judicial Conduct Commissioner
P O Box 2661
WELLINGTON

Dear Commissioner

I respectfully submit the following information and material.

I advance this information on the basis that it is relevant to the decision which you, as the Commissioner, will be required to make pursuant to s 18 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 as to whether to recommend to the Attorney-General that he appoint a panel pursuant to that section to inquire into the conduct of Justice Wilson.

I consider the complaint too serious to refer to the Chief Justice under s 17 of the Act. Nor is that course a viable alternative. Although their business relationships have been terminated, the Chief Justice, together with her husband, Mr Hugh Fletcher, and Justice Wilson were partners in three ventures in the horseracing industry. These ventures have been referred to in the media. In addition, a weekly newspaper has without foundation questioned the Chief Justice's actions in respect of Justice Wilson's breach of ethics and posed the question whether she thinks she should resign.

Hence, this letter is directed to s 18.

<u>Introduction</u>

1. I am not concerned with the question of the alleged conflict of interest itself or the question whether or not judges should have business relationships with counsel. Lawyers will argue about these issues for all eternity and, probably, even beyond that. Nor am I interested in the argument advanced by Saxmere's counsel relating to s 4(2A) of the Judicature Act 1908. That argument, properly one for the Court, does not strike me as persuasive. Indeed, I regard it as a "red herring" in that it has, or may have, the effect of diverting attention from the key issues arising out of Justice Wilson's conduct. My focus is solely on the question whether the Judge's conduct is a breach of judicial ethics.

2. There are four respects in which I consider Justice Wilson's conduct failed to meet the requisite ethical standard of judicial conduct. They are –

(1) Giving the Chief Justice a “categorical assurance” that he was not “beholden” to Mr. Alan Galbraith QC when, although he may not have known the exact amount, he was and knew he was substantially indebted to Mr. Galbraith;

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(2) Failing to fully disclose a patently relevant matter to the Court (and to the litigant) when required to disclose his interest to the Court for the purpose of determining whether the informed and fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the issue;

(3) Following the delivery of the Court's judgment dated 3 July 2009, failing to inform the Court (and the litigant) having regard to paragraph 25 of the judgment that he was in fact substantially indebted to Mr. Galbraith; and

(4) Failing to make the disclosure referred to in the forgoing subparagraph knowing that Saxmere Company Ltd ("Saxmere") was either entitled to apply to recall the Court's judgment of 3 July and obtain a rehearing or, at the very least, that it was entitled to the opportunity to apply to recall the judgment and argue that it was entitled to a rehearing,

3. It is probably appropriate that I should declare where I stand on these issues. Shortly put, although the phrase is not mine, I am of the view that, if established, each of these matters constitutes a "hanging offence".

4. In advancing this material, I feel obliged to disclose the identity of my source. He is Mr James Farmer QC. Mr Farmer conveyed the information to me in a number of verbal discussions, either in person or on the telephone, and in an ongoing exchange of email messages. At the time the matter was originally discussed with me, Mr Farmer did not ask that the information be kept confidential. I later conceded, however, that confidentiality was probably to be implied. Since then I have put all the circumstances before a retired Judge (from Hong Kong) and he concluded that my concession was unduly generous. But irrespective of that issue, I have made it plain from the outset that the integrity of the Court and the judiciary must be the paramount consideration and, if necessary, must prevail over any question of confidentiality.

5. I have not attached copies of the exchange of email messages to this letter. There is much in them that is not relevant to the issues identified above. I accept, however, that copies of the emails must be made available if you, as the Commissioner, so direct.

6. In outlining the material, I make no distinction between Justice Wilson's "indebtedness" to Mr Galbraith and Justice Wilson being "beholden" to him. I note that in the transcript of the argument before the Supreme Court on 24 November 2009 counsel for Saxmere tended to draw a distinction between the notion of "indebtedness" and the notion of being "beholden". I make no such distinction and refer only to the word "indebtedness" using it in its primary dictionary meaning of "owing gratitude or obligation", and not just money.

The information

7. On a Friday in late June or early July, I was having lunch with Mr Farmer. He is one of my closest personal friends. Mr Farmer told me that something big was afoot in the Supreme Court and that it was unbelievable. He was visibly upset. Mr Farmer then divulged that at the time Justice Wilson had sat in the *Saxmere* case in the Court of Appeal and Mr. Galbraith had appeared as counsel for the successful party, the Judge owed Mr. Galbraith $500,000. (This sum was an overstatement which was subsequently corrected.) The indebtedness had not been disclosed to the Court. Mr Farmer advised me that Saxmere was seeking a re-hearing. The matter would eventually break in the media and become public knowledge. If Justice

Wilson did not resign, he would be hounded by the media and forced to resign. In addition to the fact that Justice Wilson had not made full disclosure to the Court, Mr Galbraith "needed the money". (This comment would have had greater application in the ensuing years.) Mr Farmer was extremely critical of Justice Wilson's failure to disclose the indebtedness and endorsed a comment made by Mr Carruthers that "Bill [Justice Wilson] has feet of clay".

8. I was told that Mr Carruthers had tried and tried to persuade Justice Wilson to disclose the indebtedness but he had adamantly refused to do so. This statement was repeated at least once more in subsequent conversations.

9. On 3 July 2009 the Court delivered its judgment on Saxmere's application for a re-hearing. The Court refused the application. On the basis of the materials supplied by Justice Wilson it concluded that the company owned by Mr Galbraith and Justice Wilson was a passive land holding vehicle for the partnership which did not appear to have any indebtedness. In the course of his judgment, however, Blanchard J said (in paragraph 25):

> 25. The objective observer might then turn attention to whether the Judge might in some way be beholden to Mr Galbraith because of the business dimension of their relationship and might unconsciously favour the side represented by Mr Galbraith because of some fear of disadvantage to himself (the Judge) if Mr Galbraith's client were to lose the case. Such a situation might theoretically exist if, for example, the Judge had been lent money by counsel or was dependent on counsel in order to meet some liability. However, the materials placed before the Court reveal nothing of this kind. There is nothing to indicate any indebtedness by the Judge to Mr Galbraith, not any indication of any inability of their joint company, Rich hill Ltd, to meet its obligations. It is in fact, save for a breeding operation confined to one or two horses per year, a passive land holding vehicle and does not appear to have any significant indebtedness….

(See also paras. [46] and [47] per Tipping J; para. [115] per McGrath J; and paras. [122] and [123] per Gault J.)

10. Justice Wilson telephoned Mr Galbraith following the hearing and said that he had been "vindicated". Mr. Galbraith was astonished at this claim as Justice Wilson had not disclosed his indebtedness and he had been pressing the Judge to meet his obligations.

11. Paragraph 25 caused considerable consternation. Mr. Galbraith was said to be "very unhappy." It was decided that he would go to the Chief Justice at once and advise her of Justice Wilson's indebtedness. I firmly agreed with that course of action and, indeed, said that in my view there was no other course that could properly be followed. Mr. Galbraith intended to take such documents with him as would be necessary to verify the debt. The figure owing was said to be something like $100,000 to $200,000 at the time of the original hearing, that is, in 2007. There were certain "contra" arrangements between Justice Wilson and Mr. Galbraith which had offset the amount which would otherwise be due, but these "contras" did not eliminate Justice Wilson's substantial indebtedness to Mr. Galbraith.

12. As the position had worsened since 2007, Mr. Galbraith had increased his demands for payment from Justice Wilson. But he had been seeking repayment in 2007. Indeed, a guarantee had been completed at that time, which Mr. Galbraith had signed, guaranteeing Justice Wilson's facility at the bank for approximately $1 million dollars. The guarantee also had not been disclosed.

13. Mr. Galbraith, Mr. Carruthers and Mr. Farmer had a discussion over the weekend. The proposed course of action whereby Mr. Galbraith would see the Chief Justice and inform her of Justice Wilson's indebtedness was deferred. It was decided that Mr. Carruthers would approach Justice Wilson and persuade him to resign. I was advised that "despite the disgraceful way in which Bill [Justice Wilson] has acted, he should be given the opportunity to receive advice from Colin [Mr. Carruthers] as to the honourable course that he should now take, which is to take immediate steps to ensure that Saxmere is apprised of the correct position so they can seek a re-hearing." It was appreciated by them that the inevitable consequence would be the resignation of Justice Wilson, but it was thought that he should be given the chance of making a voluntary disclosure first. They agreed that Justice Wilson should not be allowed to "dither" and, indeed, that his response needed to be immediate.

14. Although the facts as they developed had become more complex than first advised, Mr Farmer assured me that Mr Galbraith and he had not departed from the three basic points that had been agreed upon from the outset. These points were reiterated from time to time. They are:

1) Saxmere <u>must</u> have a re-hearing;

2) Justice Wilson had no option but to resign; and

3) If he did not resign it was inevitable that the media would get on to the matter and make Justice Wilson's tenure impossible – and the Court itself would suffer in the process.

15. On 6 July I was advised that Mr Galbraith would be arranging an appointment with the Chief Justice. Further communications then took place over the next two weeks in which I continued to urge, among other matters, that Mr. Galbraith meet with the Chief Justice without delay. The concern was that Justice Wilson would be sitting on further appeals in the meantime. I therefore suggested a deadline.

16. I was advised on 17 July that Mr. Galbraith was seeing the Chief Justice before the end of that week and that this arrangement had been made before I had suggested the deadline. Mr Galbraith was preparing a schedule or accounts to table with the Chief Justice which would show the amount of the indebtedness in 2007 when the *Saxmere* case had been heard and again in each of the subsequent years when Justice Wilson had sat on the Supreme Court in applications for leave or on appeals and Mr Galbraith had appeared as counsel.

17. As far as I can ascertain, Justice Wilson sat in four further cases in which Mr. Galbraith had appeared as counsel. These cases are:

(1) *New Zealand Exchange Limited* v *Bank of New Zealand* [2008] NZSC 54 (hearing 7 July 2008).

(2) *New Zealand Recreational Fishing Council Inc* v *Sanford Limited* [2009] NZSC 54 (hearing 12 February 2009).

(3) *The Commerce Commission* v *Carter Holt Harvery* [2009] NZSC 48 (hearing 25 May 2009).

(4) *Ngai Tahu Property Limited* v *Central Plains Water Trust* [2009] NZSC 24 (hearing 13 and 14 October 2009).

It was acknowledged that the parties in these cases would also be entitled to a re-hearing. (I understand that the initial complaint to the then Judicial Conduct Commissioner was filed before any of these cases were heard and its application for a rehearing was filed before the last three cases were heard.)

18. Shortly after the Court's judgment of 3 July Mr. Galbraith spoke to Justice Wilson on the telephone. Justice Wilson told Mr. Galbraith that he had approached Justice Blanchard, who had presided at the hearing and written the judgment, and been advised that paragraph 25 only applied or was only intended to apply to "on demand" debts. This advice was met with disbelief. (It has since been confirmed that no such conversation took place.)

19. At about the same time Mr Farmer advised me that he understood Justice Wilson had talked to the Chief Justice and made some sort of disclosure to her. Mr Galbraith and he did not know, however, just what the disclosure was and, as a result, Mr. Galbraith would himself disclose the full extent of the indebtedness. Although there had been some imbalance in the partnership accounts at the time of the hearing in the Court of Appeal in 2007, that imbalance had been offset by certain arrangements. Justice Wilson had undertaken an obligation which would otherwise have had to be met by Mr. Galbraith. (This arrangement will be a reference to Justice Wilson undertaking exclusive liability for the payment of principal and interest on the company's debt of $168,555 to the bank.) It was again affirmed that, notwithstanding that the sum owing in 2007 was less than the $500,000 originally mentioned and was of the order of $100,000 to $200,000, it should still have been disclosed by Justice Wilson. There was no departure from the three basic points; that Saxmere must have a rehearing, that Justice Wilson should resign and that, if Justice Wilson did not resign, he would be hounded by the media and forced to resign.

20. Mr Farmer confirmed that the financial position had deteriorated substantially since 2007 and that, on his judge's salary, Justice Wilson did not have the ability to meet the build-up in the amount of his indebtedness. Discussions were in progress to enable Justice Wilson to be bought out by Mr Galbraith.

21. When it appeared to me that the Chief Justice may not have been apprised of the matters traversed above, I rang the Chief Justice's office on 19 July. The Chief Justice rang me from Hong Kong on 20 July. I read the notes that I had made of my communications with Mr Farmer, but I did not disclose his identity. The Chief Justice said she had received a "categorical assurance" from Justice Wilson that he was not "beholden" to Mr. Galbraith. Although I cannot now be certain, I was either told or assumed that the assurance had been given at the time of the hearing in the Court of Appeal or the first hearing in the Supreme Court. I am again not certain, but I also think I was told that the assurance had been sought and given in writing.

22. The Chief Justice was satisfied that she had done everything that she could do in the circumstances. She was not prepared to act, or could not act, on the basis of rumour or an anonymous report. The Court's judgment made it plain that the decision whether a judge is "beholden" to a party or counsel is a decision for the individual judge to make, and she felt bound to accept Justice Wilson's "categorical assurance." She was sickened by what I had told her, however, and repeatedly asked me to persuade my source to reveal "her" identity and make a formal complaint. The Chief Justice said that she would then act upon that complaint.

23. By letter dated 27 July 2009, I wrote to the Chief Justice referring to the earlier telephone conversation confirming the information I had received that Justice Wilson had failed to make full disclosure to the Court. I described the letter as a “formal communication”. I append a copy of the letter marked with the letter "A". I attached notes of my conversations and communications with Mr Farmer to the letter, again without disclosing his identity. A copy of the notes is appended marked with the letter "B". Copies of the letter and notes to the Chief Justice were forwarded to the Attorney-General and Solicitor-General. (I do not wish to revise anything contained in those notes other than that in the third paragraph up from the bottom of page one, I state that Mr. Galbraith, Mr. Carruthers and Mr. Farmer had “a meeting.” Subsequent information indicated that the departure from the original course and decision to give Justice Wilson the opportunity to resign voluntarily had been arranged over the telephone.)

24. I received a letter dated 12 August 2009 from the Chief Justice advising me that the matter would be directly addressed by the Judge and by the Court and that this was in hand. For completeness, a copy of the letter is appended, marked with the letter “C”.

The relevance of the information

25. I would respectfully suggest that the information is relevant for the following reasons:

1) The “categorical assurance” Justice Wilson gave to the Chief Justice that he was not “beholden” to Mr. Galbraith was, at worst, false and, at best, misleading. Mr. Galbraith knew, even in the absence of the company’s accounts that Justice Wilson’s indebtedness was of the order of $100,000 to $200,000. Justice Wilson would also have known that the indebtedness was of that order. (In fact, it proved to be $242,804. This is the aggregate figure given by the Court in its judgment of 27 November. See para. [16]. It is possible, however, that the true measure of the imbalance is $158,527. But the figures are so large that the difference, even if correct, is immaterial.)

2) The information confirms that Justice Wilson’s failure to disclose the imbalance in the shareholders’ account was not an oversight or otherwise inadvertent. While considerable detail was included in his statement dated 19 December 2008 (which, in itself, suggested that it was the full picture) the failure to refer to his indebtedness was clearly a deliberate decision.

3) The information points to the fact that the effect of paragraph 25 of the Court’s judgment dated 3 July (see para. 9 above) would have been immediately appreciated by Justice Wilson. The Judge's advice of his conversation with Justice Blanchard confirms that he fully realised the significance of the paragraph. Further, the concern paragraph 25 caused to his colleagues would have been known to Justice Wilson as both Mr. Galbraith and Mr. Carruthers were communicating directly with him. His decision not to file a further statement or otherwise disclose his indebtedness in response to paragraph 25 also must have been a deliberate decision.

4) The above narrative is incompatible with any suggestion that Justice Wilson "drifted" into a situation which eventually "got out of hand". From the inadequate and inappropriate telephone call to senior counsel acting for Saxmere prior to the hearing in the Court of Appeal, to the failure to make full disclosure prior to the first hearing in the Supreme Court, to the failure to rectify the situation when the Court indicated its decision could be otherwise in paragraph 25 of its first judgment, to his statement that his contribution to the shareholders' account was only six per cent less than Mr Galbraiths, and to the statement

finally made after the Court insisted that it be furnished with money sums, disclosure of the substantial imbalance in the shareholders' account was suppressed. The overall picture is clear; disclosure of the imbalance in the shareholders' account (and any reference to the guarantee or the exclusive obligation to repay the company's debt) was avoided until, as a result of the Court's specific request, it could be avoided no longer.

5) From 3 July 2009 until he was required to disclose the financial position and did so on 30 September 2009, a period of just on three months, Justice Wilson knew that, on the basis of the Court's judgment, Saxmere was entitled to a rehearing or, at least, to the opportunity to apply to recall judgment and seek to obtain a rehearing. Justice Wilson did nothing to correct the Court's misapprehension as to the true facts. On the above evidence, and having regard to the timing of the subsequent events, the Judge was apparently prepared to deprive Saxmere of a rehearing even though aware that the company was entitled to a rehearing or entitled to information that would enable it to reargue its case for a rehearing. For any judge, and certainly a Judge of the Supreme Court, to knowingly disregard the fact a litigant is being held out of a legal entitlement; in this case the opportunity to press for a rehearing on facts that had already been flagged by the Court and were known to the Judge, is utterly unacceptable

6) If the information is correct, and it seems highly improbable that Mr Galbraith or Mr Farmer would make it up, Justice Wilson rang Mr. Galbraith following the Court's judgment of 3 July and, referring to paragraph 25, told him that he had discussed the matter with Justice Blanchard, and that Justice Blanchard had told him paragraph 25 referred to debts that were "on demand", or words to that effect. This story is fictitious. No such conversation with Justice Blanchard took place. But the claim indicates Justice Wilson remained intent on continuing to withhold the financial information, notwithstanding that he now certainly knew, if he did not know before, that the Court regarded evidence of any significant indebtedness as being critical to its decision to dismiss Saxmere's application for a rehearing.

7) In his statement dated 19 December 2008, Justice Wilson states that he does not regard a business relationship between a judge and counsel as creating a conflict of interest unless there is some connection between the business and the subject matter of the litigation (para. 8) and that he did not think that it was appropriate to make a formal disclosure (para. 11). This claim ignores the fact that Justice Wilson did in fact purport to disclose details of his business relationship with Mr Galbraith in his statement of 19 December 2008 making the omission of the financial details even more inexplicable. The fact that the Judge's indebtedness was a matter of ongoing concern, evident from the above information, is also confirmed by the fact that, in order to redress the imbalance in the shareholder's account, Justice Wilson had undertaken exclusive liability for payment of the principal and interest on the company's debt to the bank.

8) In his statement of 20 August 2009, Justice Wilson records that he had read Saxmere's application to recall the Court's judgment and that it appeared to "raise a number of issues which [he] would have addressed in [his] statement in reply if they had been raised in the affidavits in support of the application for leave and the appeal." (Para. 2. See also para. 2 in Justice Wilson's statement dated 28 August 2009.) This claim cannot stand. First, the financial aspect of the relationship had been sufficiently indicated, if only suspected, in the affidavit of Mr Radford to require a response (see, e.g., paras. 6 and 48 *et seq* of Mr Radford's affidavit sworn on 21 November 2008). Secondly, the issue before the Court was one of apparent bias and a judge of the Supreme Court would or should not need

prompting to be reminded that evidence of substantial indebtedness to counsel would be relevant to that issue. Thirdly, the above information indicates that the significance of the indebtedness would have been appreciated by the Judge, even before Saxmere's application.

9) In his statement of 30 September 2009, Justice Wilson states that there was no agreement that the "shareholder accounts would be maintained at exactly the same level so as to create indebtedness to the extent of any imbalance" (para 2). The use of the words "exactly the same level" obscures the fact that in 2007 the shareholders' account was already in substantial imbalance and that Mr Galbraith was pressing Justice Wilson for payment of his contribution. Nor is it consistent with the fact that, with Mr Galbraith's cooperation, the company had entered into a guarantee to provide security for Justice Wilson's loan from the bank.

10) Justice Wilson observes in the same paragraph that he does "not agree that an imbalance in shareholders' accounts of itself results in indebtedness, directly or indirectly, between shareholders." He continues, "I am not aware of any legal or accounting principle which supports such a proposition." (Para 2. See also Justice Wilson's statement dated 28 August 2009, para 7). Apart from seemingly ignoring the manner in which shareholders' accounts operate, Justice Wilson's assertion is inconsistent with the above information. The shareholders' account was not mentioned. At all times the deficit is treated as an amount owing to Mr. Galbraith and an amount which he was seeking to have paid.

11) The suggestion that Justice Wilson was not required to disclose the imbalance in the shareholder's account because he is unaware "of any legal or accounting principle which supports such a proposition" is legally untenable. The obligation on a judge is to disclose facts or circumstances relevant to the test for apparent bias. This obligation is not circumscribed by technical rules. It is a question which requires any facts or circumstances which might cause a fair-minded observer to reasonably apprehend that the judge may lack impartiality to be disclosed. A substantial imbalance in a shareholders' account, including a financial adjustment in respect of the company's debt to the bank, clearly comes within that category.

12) In his statement of 28 August 2009 Justice Wilson states that he thought "that the shareholders' contributions of Mr. Galbraith [and himself] were approximately equal when allowance was made for the bank debt for which [he] was solely responsible." (Para 8). This belief is belied by the above information and the fact that Justice Wilson assumed sole responsibility for the payment of principal and interest on the company's bank debt in order to offset the imbalance which existed or would exist in the shareholders' account and that the guarantee from the company was completed in order to enable Justice Wilson to finance his share of the shareholders' account. It is to be noted that the guarantee had not been overlooked as it had been mentioned to Mr Farmer by Mr. Galbraith as early as the beginning of July. (While Justice Wilson's borrowing is said to be against his equity in the company (para. 11), the guarantee was from the company, and the company, not just Justice Wilson's equity, was ultimately liable on that guarantee.)

<u>The ramifications</u>

26. It would have been more comfortable to have refrained from drawing the information I had received to the attention of the Chief Justice, the Attorney-General and the Solicitor-General. It

would also be more comfortable to refrain from writing this letter to you as the Judicial Conduct Commissioner. But having been made privy to the matter in late June and July, I have necessarily become conscious of a number of aspects that have caused me deep concern. The ramifications may be listed as follows:

1) Justice Wilson is a Judge of the Supreme Court, the highest Court in the land. Although it is imperative that all judges, at any level, abide by the high ethical statements required of the judiciary, it is doubly important that the highest standard be maintained in the country's senior Court.

2) The overriding consideration must be the integrity of the Court. That integrity is undermined when a judge acts in such a way as to mislead the Court and his colleagues on the Court. The Court, and not just the individual judge, is tarnished. There is a real risk that the Court will be seen as dysfunctional. The Court, and not just the individual judge, is brought into disrepute.

3) A serious breach of judicial ethics of this kind must necessarily impair the public's confidence in the Court and in the administration of justice. The public look to the judiciary for stability, but underlining that stability is an expectation of integrity, including impartiality. If that integrity is not maintained the basic principle of judicial independence becomes that much harder to justify. The rule of law itself is placed in jeopardy. These sentiments are not empty rhetoric; they represent the reality of our unwritten constitution in which the independence of the judiciary and the rule of law are fundamental.

4) The Supreme Court is a collegial institution. That collegiality is important for it to function effectively. It is difficult to believe that Justice Wilson's conduct will not have seriously harmed the collegiality of the Court. As a past appellate judge, and one who has sat on the Supreme Court, I can testify that I would find it difficult to work alongside Justice Wilson.

5) The reaction of other judges in the Court hierarchy is also relevant. Many or most judges will take the view that, if the ethical breach had been theirs, they would have already been forced to resign. Many or most may also resent the fact that their judgments will from time to time be scrutinized and judged by a Judge who has been guilty of conduct that they do not, and would not, condone and which they would not be, and have not been, guilty of committing.

6) Justice Wilson's conduct must also be of concern to counsel who appear in the Supreme Court. No counsel can know, or fully know, the dynamics of the Court. Yet, Justice Wilson's conduct must have been destructive of a sound working relationship, certainly one characterised by mutual confidence. Counsel do not and will not know, for example, to what extent Justice Wilson feels obligated or antipathetic to one or more of the other Judges on the Court as a result of this unfortunate occurrence. Even if the lasting effect of the disruption cannot be predicted with certainty, counsel appearing in that Court should not be confronted with this problem.

7) Litigants are also likely to be disadvantaged. Unsuccessful litigants will be inclined to wonder whether the presence of Justice Wilson on the Court affected the outcome, particularly if the decision is a majority decision of three to two and Justice Wilson is in the majority. It is no answer to say that Justice Wilson will not have a conflict of interest in such cases. The point is that litigants will not come to the Court with the level of trust and confidence any court, and certainly the final Court, requires to validate the system.

8) It is difficult to see how Justice Wilson could, if he remains on the bench, sit in any appeals where Mr. Galbraith, Mr. Carruthers, or Mr. Farmer appear as counsel (and they should not, of course, be precluded from appearing) having regard to the fact that the original course of action (Mr. Galbraith going to the Chief Justice and disclosing Justice Wilson's indebtedness) was not pursued. Not adhering to that course could be seen as an act of forbearance on their part giving rise to a level of gratitude that might lead the informed and fair-minded observer to consider that Justice Wilson is not impartial when any of them appear before him. At least, parties in cases where Mr. Galbraith, Mr. Carruthers or Mr. Farmer appear on the opposing side as counsel should be given the opportunity to argue that the appearance of bias exists.

9) Not just the judiciary, but the profession as a whole, will feel let down by Justice Wilson's conduct. Individual practitioners are proud of their profession; its professionalism, its traditions and its ethical standards. They are jealous of its reputation and conscious of the reputation they vicariously enjoy by virtue of being a member of that profession. Justice Wilson's conduct must necessarily have a detrimental effect on their perception of the profession and their participation in the profession. In the last few days, I have attended a legal gathering and then a Law Society function. On both occasions Justice Wilson's conduct was a frequent topic of conversation. All who spoke of it were dismayed or appalled. The phrase; "He has got to go", was commonly employed.

10) I have been particularly concerned about the impact of Justice Wilson's conduct on younger practitioners, who make up the bulk of the profession. They cannot help but feel disillusioned if a Judge who is guilty of the serious lapse in question remains on the Court and the system proves inadequate or unable to deal with it.

11) I have the same concern for law students, who are the future of the profession. As a Distinguished Visiting Fellow at the Law School at the University of Auckland, I have been working with students for just on five years. I know exactly how they will react when they return to the campus next year. They are all earnest, enthusiastic, and most of all, utterly lacking in cynicism. They will react with incredulity. The fact a Judge of our highest Court has shown such a signal lack of judgement will be inexplicable to them. Their respect for the Court and the system will necessarily take a blow. And they will no doubt wonder how in the fullness of time they will be expected to appear before this Court with due respect.

12) I have heard it suggested that the principles relating to apparent bias have changed and that this may have caused in whole, or in part, the difficulty Justice Wilson finds himself in. The argument is fallacious. The courts have modified the principles from time to time, but the ethical requirement that a judge make full disclosure to the court or counsel when required to disclose his or her interest has never been in doubt. Similarly, it has never been in doubt that a judge cannot give his or her senior judge an assurance which is incomplete or misleading.

13) Justice Wilson's colleagues were right when they concluded in July that, if Justice Wilson did not resign, the media would pursue the issue and that he would be "hounded" from office. I suspect that the media publicity has barely started. As the facts unfold the adverse publicity will increase in intensity. The reputation of the Supreme Court, the judiciary, and the profession will necessarily suffer even further. If Justice Wilson does not resign or is not removed, this debilitating publicity will continue. Moreover, it is realistic to recognise that, should Justice Wilson remain, the media will be prone to recall the matter

when he is reported in connection with any judgment in the future. Experience suggests that it is a "tag" which will not go away.

14) Justice Wilson had the opportunity to resign at any time following Saxmere's initial application for a rehearing. In particular, he could have purported to act on paragraph 25 of the Court's first judgment and sought to resign with a semblance of honour. His decision not to do so in the knowledge that the non-disclosure of his indebtedness to Mr Galbraith would result in the Court being subject to ongoing adverse publicity, to the Court's reputation suffering, to public confidence in the Court being impaired, and to Saxmere being deprived of the opportunity to seek a rehearing, reflects a less than empathetic regard for the Court as an institution.

15) Finally, in the course of a career in the law that has spanned 52 years I never once imagined that I would see a headline in a print media reading, “Half-truth Supreme Court judge…” - and know that the charge cannot be readily refuted.

Complaint, etc.

27. I am aware that the complaint before you was made some time ago, and that you have asked that it be updated. I am not aware of the terms of the complaint or whether it can be challenged in any way or whether it is circumscribed in scope. In the event of any such difficulty I would ask that this letter be treated as a complaint under s 11 of the Act in respect of the Judge's conduct as specified in paragraph 2 above.

28. I have found it helpful to refer to Grant Hammond's excellent new book, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009). It needs to be borne in mind, of course, that the author is primarily focused on conflicts of interest that from time to time arise on the bench and not the question whether the conduct that is associated with the conflict is in fact judicial misconduct. One cannot disagree, however, with Hammond's observation: "Judges have a duty of candour here". (See pp 90 and 143-144).

29. In this letter I have referred to conversations with Mr Farmer and with the Chief Justice. In the ordinary course of events I would, as a matter of courtesy, send them a copy of this letter. I have also kept the Solicitor-General informed as to what steps I am taking and would also send him a copy. As I am uncertain what procedure you will follow, however, I will defer sending copies to them unless you consider that it is open to me to do so.

30. Please advise me if you have any queries or if I can assist in any other way.

Yours faithfully

The Rt Hon Sir Edmund Thomas, LLB(NZ) LLD(VUW) KNZM QC

27 July 2009

APPENDIX A

The Rt Hon Justice Dame Sian Elias
Chief Justice of New Zealand
C/- Supreme Court of New Zealand
P O Box 61
Wellington

Private and Confidential

Dear Chief Justice

I refer to our earlier telephone conversation relating to the information I have received asserting that Justice Wilson failed to make full disclosure to the Court in Saxmere's application for a rehearing. It struck me afterwards that a telephone conversation was an unsatisfactory means of communicating this matter to you, particularly as you were overseas. This letter is intended to be a more formal communication.

I am deeply troubled at having to write this letter. I have always held Justice Wilson in the highest respect and regard him as a good friend. I believe that he is an honourable person who would be fully conscious of his obligation as a Judge of the Court to make a full and accurate disclosure of any alleged conflict of interest. I would, therefore, be quick to dismiss the information I have received on the basis that the source has insisted upon anonymity but for the fact the informant is clearly close to the "horse's mouth". From the communications I have had with the informant I believe that, if the information is incorrect, it is because the informant has been misinformed.

I have reached the view that it is necessary to draw this matter to your attention. While the integrity of the Court must be the primary concern I do not doubt that Justice Wilson would want the opportunity to clear the matter up, particularly as the allegation that the Judge's disclosure was incomplete could well gain the attention of the media.

I should add that I regard my informant's insistence on retaining confidentiality as understandable in the circumstances, and having received the information on that basis I wish to continue to respect that confidentiality.

I now enclose notes of the information conveyed to me. I have used initials for everyone; "B/W" for Justice Wilson, "A/G" for Alan Galbraith QC, "C/C" for Colin Carruthers QC, and "J/F" for Jim Farmer QC.

I note that you received a "categorical assurance" from Justice Wilson that he was not "beholden" to Mr Galbraith when he sat on the *Saxmere* hearing in the Court of Appeal and that you have not sought any further assurance prior to the hearing of Saxmere's application for a rehearing. Your reluctance to act upon information where the informant insists on anonymity is wholly understandable. You may consider, however, that an inquiry seeking a more detailed account of the business relationship between Justice Wilson and Mr Galbraith is now prudent in the light of the principles spelt out by the Court in its judgment refusing Saxmere's appeal. Paragraph [25] of Blanchard J's judgment, for example, indicates that a conflict might exist if the Judge had been lent money, or was dependent on counsel in order to meet some liability, or if there was something to suggest any indebtedness by the judge to counsel.

I reiterate that I am not vouching for the accuracy of the information. On the one hand I find it impossible to believe that it is correct. On the other hand the informant is credible and the nature and detail of the information is remarkable. The decision as to whether to act and, if so, what to do, is not mine to make. But I feel that I cannot escape an obligation to pass the information I have received on to you as the Chief Justice with copies to the two senior law officers of the state, the Attorney-General and the Solicitor-General.

Finally, I wish to clarify that my concern is not with the question of a conflict of interest. A conflict, a perceived conflict, or an appearance of bias may or may not exist. My concern, and the reason I proffer this letter, is solely related to the serious allegation that a Judge of the Court has not made full disclosure when under an obligation to do so.

Yours faithfully

Rt Hon E W Thomas DCNZM QC

P.S: Since writing the above, and while you were still overseas, I rang the Solicitor-General and advised him that copies of this letter and enclosed notes were being sent to the Attorney-General and to him.

APPENDIX B

NOTES RE WILSON/SAXMERE

Bill Wilson did not make full disclosure in *Saxmere* case.

Bill Wilson owed Alan Galbraith a substantial sum at time of hearing. The informant initially understood that this sum was $500,000. The figure was later revised to something like $100,000 to $200,000 as at the time of the original hearing. It is claimed that there are "contra" arrangements as between B/W and A/G, but these did not eliminate B/W's indebtedness to A/G.

A/G has been demanding payment for a long time. But B/W is unable to pay. This indebtedness was not disclosed.

Also not disclosed was the fact A/G signed a guarantee of B/W's faculty at the bank of approximately $1 million.

When the Court's judgment in *Saxmere* came out it caused considerable consternation on the part of A/G, C/C and J/F, particularly as Blanchard J proffered as an example of a disqualifying interest the financial indebtedness of a judge to counsel.

B/W has apparently said that he spoke to Blanchard J after the Court's judgment and was advised that the hypothetical example given in his judgment would only apply if the debt was

"on demand". Yet, A/G had been demanding payment. (I questioned my informant on this as I do not believe that Blanchard J would have given that advice.)

A/G, C/C and J/F were agreed that -

- there was no alternative but for B/W to resign;

- *Saxmere* is entitled to a rehearing; and

- if B/W does not resign the media will definitely get on to it and he will be "hounded" from office. A lot of people associated with the business relationship of B/W and A/G know that full disclosure was not made.

It was initially decided that A/G would go direct to the CJ and outline the facts. But A/G, C/C and J/F then had a meeting and it was agreed that C/C would approach B/W and persuade him to make full disclosure to Saxmere and then resign on the basis that he had not anticipated the criteria set out in the Court's judgment.

Since the *Saxmere* hearing B/W has sat on at least two other cases in the Supreme Court where A/G was a counsel. By then the financial position had become worse.

The informant was led to believe that B/W had spoken to the CJ following the judgment and disclosed the full position. The informant was also led to believe that A/G had set out the full position to the C/J since the judgment. The informant later came to suspect (correctly) that neither has occurred.

The informant has also been led to believe that B/W's business interest is being bought out. But that will not meet the fact that he failed to make full disclosure to Saxmere or the Court when full disclosure was required.